

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

BARRY EMMETT,
(TDCJ-CID #1383329)

Plaintiff,

vs.

UTMB, *et al.*,

Defendants.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION H-13-3448

MEMORANDUM ON DISMISSAL

Barry Emmett, a Texas Department of Criminal Justice inmate, sued on November 20, 2013, alleging a violation of his civil rights. Emmett, proceeding *pro se*, sues prison officials at the Estelle Unit and the University of Texas Medical Branch. Emmett has neither paid the \$350.00 filing fee nor sought leave to proceed as a pauper. Though Emmett indicates that he will pay the filing fee, there is no record of payment on the docket sheet. From his litigation history, the court presumes that he seeks leave to proceed *in forma pauperis*. The threshold issue is whether Emmett's claims are barred by the three-strikes provision of 28 U.S.C. § 1915(g).

I. Emmett's Allegations

In his complaint, Emmett alleges that he was denied proper custodial classification. He explains that he is visually impaired, gay, weighs only 150 pounds, and is unable to defend himself. He alleges that the defendants have refused to house him in a cell by himself. Emmett also alleges that he was forced to carry property beyond his medically ordered lifting restrictions; that prison officials have confiscated hygiene items, causing him to lose three teeth in the past two years; and that although he is visually impaired, prison officials confiscated all of his visual aids.

Emmett alleges that on June 3, 2013, he reported the use of excessive force against a wheelchair-bound inmate, and prison officials retaliated against him the following day by charging him with a disciplinary case and placing him in maximum custodial classification. He was assigned to a new cell, where his cell mate sexually assaulted him. Emmett alleges that the defendants refused to place him in protective custody. He also alleges that he was denied a “handicap” shower, causing him to fall and injure himself. Emmett alleges that the law library personnel have prevented him from using the “Free Matter for the Blind” mailing service. He alleges that he must drink recycled water, exposing him to the radiation used to treat inmates with cancer.

Emmett seeks a declaration of his rights under the Americans with Disabilities Act, the Rehabilitation Act, and the Equal Protection Clause. He seeks an injunction compelling the defendants to place him in safekeeping status and in a cell with an accessible shower.

II. Discussion

A prisoner may not bring a civil action *in forma pauperis* in federal court if, while he was incarcerated, three or more of his civil actions or appeals were dismissed as frivolous or malicious or for failure to state a claim upon which relief may be granted, unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). Before filing this action, Emmett had at least three suits dismissed as frivolous. *Emmett v. Thaler*, 4:10-2748 (S.D. Tex.) (dismissed as frivolous on December 1, 2010); *Emmett v. Office of the Clerk of Court*, 7:10-0156 (N.D. Tex.) (dismissed as frivolous on November 2, 2010); and *Emmett v. Ebner*, 4:10-3611 (S.D. Tex.) (dismissed for failure to state a claim on October 7, 2010). Emmett has not alleged that he is in imminent danger of serious physical injury. He is barred under 28 U.S.C. § 1915(g) from proceeding *in forma pauperis* in this action.

Emmett's constructive motion to proceed as a pauper, (Docket Entry No. 1), is denied. His complaint is dismissed under 28 U.S.C. § 1915(g).¹ His pending motions are denied. Emmett is warned that continued frivolous filings may result in sanctions, including monetary sanctions.


The Clerk will provide a copy of this order by regular mail, facsimile transmission, or e-mail to:

(1) the TDCJ - Office of the General Counsel, Capitol Station, P.O. Box 13084, Austin, Texas, 78711, Fax: 512-936-2159;

(2) the Inmate Trust Fund, P.O. Box 629, Huntsville, Texas 77342-0629, Fax: 936-437-4793; and

(3) the District Clerk for the Eastern District of Texas, 211 West Ferguson, Tyler, Texas 75702, Attention: Manager of the Three-Strikes List.

SIGNED on November 27, 2013, at Houston, Texas.



Lee H. Rosenthal
United States District Judge

¹ In *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1998), the Fifth Circuit barred an inmate from proceeding further under the statute, except for cases involving an imminent danger of serious physical injury, and dismissed all of Adepegba's *in forma pauperis* appeals pending in that court. The Fifth Circuit noted that the inmate could resume any claims dismissed under section 1915(g), if he decided to pursue them, under the fee provisions of 28 U.S.C. §§ 1911-14 applicable to everyone else.